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NO. .....

In the Supreme Court
OF THE
United States

OCTOBER TERM 1987

ASSOCIATED CONVALESCENT ENTERPRISES, INC.,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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68 pp

QUESTIONS PRESENTED

1. Whether the decision of the Court in *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394 (1981), setting forth important legal and public policies, and well established legal precedents, required a strict application of *res judicata* to bar relitigating the unappealed adverse judgment rendered against respondent, thus necessitating dismissal of respondent's action herein.

2. Whether in the light of the dissenting opinion below holding that respondent's action here was unequivocally barred by the doctrine of *res judicata* under the ruling of this court in *Federated,* it was arbitrary and violative of due process requirements to affirm the judgment without any opinion or statement of reasons, depriving petitioner of any reasonable opportunity to know the cause of the affirmance or the opportunity to submit a meaningful petition for rehearing or suggestion for rehearing en banc guaranteed by the Rules of Court.

3. Whether, in the light of the sole written opinion below holding on the record that respondent's action was barred by *res judicata* without exception under *Federated,* this court, as an alternative measure, in the exercise of the court's supervisory jurisdiction over proceedings of the federal courts should grant the petition and remand the case to the Circuit Court with instructions to state the reasons for the affirmance of the judgment and proceed thereafter in accordance with the Rules of Court.

LIST OF PARTIES AND RULE 28.1 LIST

The caption of the case in this Court contains the names of all parties. The petitioner, Associated Convalescent Enterprises, Inc., has no parent company, subsidiary or affiliate.

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Petitioner, Associated Convalescent Enterprises, Inc., respectfully prays that the Court issue a Writ of Certiorari to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit filed and entered on December 21, 1987.

OPINIONS BELOW

The two to one affirmance of the Court of Appeals contains only a written dissenting opinion. The decision in its entirety with the dissenting opinion is reproduced in the appendix (A-1 - A-2). The decision of affirmance is reported in 835 F.2d 1436 (Advance Sheet No. 3, February 8, 1988), among the Tables without reproduction of the dissenting opinion.

The Memorandum decision of the United States District Court for the Central District of California (Ideman, D. J.) has not been reported. It is reproduced in the appendix (B-1 - 12).

JURISDICTION

The decision and judgment of the Court of Appeals was filed and entered on December 21, 1987 (A-1 - A-2). A duly filed petition for rehearing and suggestion for rehearing en banc was denied, Judge Boochever dissenting, and the order of denial filed and entered February 17, 1988 (C-1).

The jurisdiction of the District Court was invoked by respondent pursuant to 28 U.S.C. Section 1345 and 42 U.S.C. Sections 1395, *et seq.*

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in part that "no person shall be . . . deprived of life, liberty, or property without due process of law . . ."

The provisions of 28 U.S.C. 2071 are set forth in the Appendix F.

The provisions of the California Corporations Code, Sections 1900, 1901, 1902, 1903, 1905, 2004, 2010, are set forth in the Appendix G.

The provisions of the Federal Rules of Appellate Procedure, Rule 35 (b) and Rules for the Ninth Circuit, Rule 12 are set forth in the Appendix H.

STATEMENT OF THE CASE

A. Associated Convalescent Enterprises, Inc., (hereafter "Convalescent"), a California corporation, the petitioner herein, was formally dissolved in 1977. (California Corporations Code, Sections 1900-1903, 1905. See also, Section 2010) (App. G). At that time, the Assets of Convalescent were distributed to its sole shareholder, Aruba Bonaire Curacao Trust Company (hereafter "Aruba"). See California Corporations Code, Section 2004 (App. G).

B. Three corporate health providers had allegedly overcharged Medicare. Administrative determinations against the providers were upheld in the Courts, in a case in which, Aruba, the sole stockholder was originally named as a party.

In 1980, the Government filed three related District Court lawsuits, tried thereafter as one consolidated action. Among other things, the Government's complaints charged that the officers and directors who had voted to dissolve Convalescent had illegally transferred its assets to Aruba with intent to defeat the allegedly valid claim of the Government, it being charged that Convalescent assumed the liability of the providers under a contract and agreement. The named defendants included Aruba, the providers, some of the individuals who operated the three corporate providers, some of the officers of Convalescent, as well as a tax attorney, Harry Margolis, who allegedly manipulated Convalescent for his financial interest. Aruba was also, but Convalescent was not, named as a defendant in the 1980 consolidated action.

Before the trial in the 1980 consolidated action, the Government requested that some individual defendants and Aruba, be dismissed without prejudice, but the District Court without objection dismissed *with prejudice.* From this judgment of dismissal the Government never appealed nor has the Government ever moved for relief from the judgment. The reason given by the Government, among others, for dismissing the case against Aruba and others was to restrict the alleged secondary liability of defendants in order to focus on those primarily responsible. The 1980 proceedings then were pursued and resulted in a judgment in 1982, against the three providers, affirmed on appeal in 1983. *United States v. California Care Corporation,* 709 F.2d 1244 (9th Cir.).

C. After the rendition of the prior judgment, the action here involved was instituted by the Government. The complaint filed by the Government was described as a "Creditor's Bill in Equity." It was charged that Convalescent, though "theoretically dissolved" in 1977, continues to do business; that the proceeding here was an "enforcement proceeding in equity"; that Convalescent was the alter ego of the three providers when they became indebted, and that Convalescent was liable for the judgment previously entered against the three providers. The sole prayer was for the amount of the prior judgment with interest from 1982. Convalescent set forth the defense of *res judicata,* denied that it was the alter ego of the three providers, and that the election by the Government in 1980, not to proceed against Convalescent or its privy Aruba, was a decision by the Government which was properly made and could not now be assailed by the Government. The defense of statute of limitations was also interposed.

The trial in the District Court in essence followed the allegations set forth in the 1980 complaints. The Government produced evidence of the judgment against the three corporations; the dissolution of Convalescent and the transfer of the assets to Aruba; the alleged masterminding by attorney Margolis of the various corporate structures, and that the said attorney was the alter ego of all the corporations. Although the Government under California Law could have sued Convalescent in the prior action, despite its dissolution and although Convalescent under California law was free to pursue actions in its own name pending in the Superior Court of the State of California, the Government asserted that it had been fraudulently induced to believe that Convalescent had no assets after assignment to Aruba, and therefore had not pursued Convalescent, but had chosen to assert its claim against Aruba, the successor in interest of Convalescent, and thus was allegedly as much the alter ego of the three providers as was Convalescent.

D. Following the conclusion of the trial, the District Judge rendered a memorandum decision (App. B) discussed hereafter in Point[1] *infra,* pp. 10-12. On the same day as the rendition of the memorandum decision rejecting petitioner's contentions, the Court issued a permanent injunction (App. E) requiring Convalescent to assign to the Government all documents and funds involved in litigation between Convalescent and third parties pending in Los Angeles Superior Court. The judgment of the District Court based on its memorandum decision (App. B), was entered on May 22, 1985. Convalescent duly appealed to the Ninth Circuit of Appeals.

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[1]The assignment in compliance with the Court's order was intended as possible security for the judgment. The California Action is still pending and the issues there are unrelated to the sole issue here.

E. On December 21, 1987, the judgment in favor of the Government was affirmed in a two to one decision, with *no* majority opinion, Circuit Judge Boochever dissenting in the only opinion in the case (App. A). The judgment of the Court of Appeals based on the ruling was entered on the same day.

Judge Boochever in his dissent noted that the controlling rule of law, "in this case is clear", citing this Court's decision in *Federated Department Stores, Inc., v. Moitie,* 452 U.S. 394, 398 (1981): "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Judge Boochever noted that in the first case the action had been dismissed *with prejudice* against Aruba. There seemed to be no question, noted the dissent that Convalescent was in privity with Aruba, its successor corporation, and the issue of "alter ego" clearly could have been raised in the earlier action. Judge Boochever held that on the record presented, there was no choice but to hold that *res judicata* barred the present suit against Convalescent. The dissenting Judge noted this Court's statement in Federated precluded an "ad hoc determination of the equities in a particular case" (App. A-2).

A petition for rehearing and suggestion for rehearing en banc was duly filed and denied on February 17, 1988, Judge Boochever dissenting (App. C).

REASONS FOR GRANTING THE WRIT

I

PRELIMINARY STATEMENT

This case really involves a most simple issue. Is it in accordance with due process to affirm by a two to one decision, a judgment on behalf of the government where

the record unequivocally reveals that said judgment is barred by the doctrine of *res judicata,* and where the majority files no written opinion stating any reason whatsoever for affirmance, while the dissent files a well reasoned opinion pointing out that a decision of this court mandates a reversal on the grounds of *res judicata*?

It is inherently unfair, where as here, there is a clear dissent bearing obvious merit for the majority to fail to file any opinion explaining its reasons for refusing to accept the views of the dissent. Whether or not this unfairness rises to the level of a denial of due process, as petitioner contends, it certainly raises doubts about the impartiality of the court and questions whether there is any basis for the holding of the majority.

Confidence in the fairness and impartiality of the Federal Court is as important as the actual existence of these characteristics. This is a case in which certiorari should be granted to protect both. It appears that unequivocal and important legal principles that this Court has established have been disregarded by the majority through failure to state why it did not follow these principles in this case. At the very least, the appearance of equal handed justice has been undermined. This Court has the power which it should exercise, to make it crystal clear that it will not permit an arbitrary, unexplained refusal by a lower court to follow the law; that it will protect the hard earned confidence in the judicial system. The litigants and the public are entitled to know the basis for judicial action which has the appearance of disregarding the law in order to reach a predetermined result. Bias by the court is destructive of fairness and due process. Its appearance should not be allowed to stand.

II

THE RULING OF THE NINTH CIRCUIT IS DIRECTLY IN CONFLICT WITH THIS COURT'S DECISION IN *FEDERATED DEPARTMENT STORES, INC. V. MOITIE.* THE SOLE WRITTEN OPINION OF THE DISSENTING JUDGE MAKES CLEAR THAT ON THE RECORD EVERY ELEMENT OF THE DOCTRINE OF RES JUDICATA WAS SATISFIED PRECLUDING THE SUIT AGAINST CONVALESCENT

A. This Court has stressed the various policies which underlie the rules of *res judicata.* The policies and rules have been constantly enunciated in the decisions of this Court and virtually all of the Circuit Courts of Appeal. As the dissenting opinion noted below, courts are bound to adhere to those policies and rules. They should not be, stated Judge Boochever, undermined by claims of "equities" in particular cases.[2]

Before discussing the decision of the District Court, petitioner briefly summarizes the applicable law. In the first place, the doctrine of *res judicata* serves public interests; policy considerations call for an end to litigation. Justice and fairness to litigants, economy of judicial time, public policy which calls for peace and order in society, the stability of judgments, all require an end to litigation after a judgment has been finally decreed. See *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394 (1981); *Kremer v. Chemical Construction Corp.,* 456 U.S.

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[2]Since no written opinion was rendered by the two Judge majority in the Court below, it is difficult to know the grounds for disregarding the well settled policies and rules governing *res judicata,* except the appeal by the government to the equities of the situation.

461, 466 n.6 (1982); *Nevada v. United States,* 463 U.S. 110, 129-130 (1983);

Lower courts have not only followed *Federated,* but have declined to countenance "simple justice" and "equitable" exceptions. See, for example, *U.S. Industries Inc. v. Blake Construction Co.,* 765 F.2d 195, 207, 209, 210 (D.C. Cir. 1985) (*res judicata* — "A party who makes a unilateral, unauthorized determination not to go forward on issues that were properly in the case does so at its own peril"); *Rose v. Town of Harwich,* 778 F.2d 77, 82 (Cir. 1985) *cert. den.* 106 S.Ct. 2278 ("But if courts relaxed the principles of claim preclusion every time it appeared that a litigant had a strong claim 'on the equities,' the doctrine would fail to serve its purposes of promoting judicial economy and repose."); *Cannon v. Loyola University, Chicago,* 784 F.2d 777, 779-780 (7 Cir. 1986) *cert. den.* 107 S.Ct. 880 (1987) (dismissal for failure to state a claim is a judgment on the merits and constitutes a *res judicata* bar — "while the theory of relief may have changed, the cause of action remains the same."); *Medina v. Chase Manhattan Bank., N.A.,* 737 F.2d 140, 144 (1 Cir. 1984) (After request for voluntary dismissal, suit dismissed with prejudice — *res judicata* bar — "But if this order [dismissal with prejudice] was wrong, Medina's recourse was to file a timely petition for reconsideration") Other claimed exceptions to the doctrine have been similarly rejected — unfairness, injustice, different theories (when the same operative facts or transactions are the same in both cases), "artificial pleading," different relief, and other alleged exceptions.

In the second place, on the issue of privity, this is usually decided by demonstrating that the relationship between the one who is a party and another is close enough to include that other within *res judicata.* A host of

decisions hold that privity exists when there is a successive relationship to the same property or right. *1 B. Moore's Federal Practice,* Section 0.411 [1], p. 392, *et seq.* See, for example, *Williams v. Pacific Royalty Company,* 247 F.2d 672, 676, 677 (10 Cir. 1957). Indeed, the District Court in its decision virtually conceded that the criteria of privity were met in this case.

Thirdly, the Government can, as in the case of private litigants, be bound by a prior judgment against it on behalf of a defendant and its privies. See, *Montana v. United States,* 440 U.S. 147, 153 (1979); *Nevada v. United States,* 463 U.S. 110 (1983) *reh. den.* 464 U.S. 875 (1983); *United States v. Moser,* 266 U.S. 236 (1924). There is no exception for the Government.

Finally, a dismissal with prejudice is a dismissal on the merits. Rule 41(b), Federal Rules of Civil Procedure.

B. It appears clear that Judge Boochever implicitly found the memorandum decision of the District Court (App. B) to be without merit or even relevant. In fact, that opinion casts no light on any possible basis for the majority decision. The District Court never dealt with the question of *res judicata.* The District Court believed that only an issue of collateral estoppel was before it. The Court chose to discuss only "privity" and "issues litigated," conceding, of course, that a "dismissal with prejudice operates as an adjudication on the merits and bars later action" (App. B-6).

On the issue of privity, the District Court recognized that privity exists when there is a "substantial identity" of "sufficient commonality of interest between parties, and a shareholder who controls a corporation is presumed to have sufficient commonality of interest in litigation involving the corporation. Further, stated the District

Court, when a person owns all the outstanding shares of the corporate stock and exercises control over its day to day affairs, there is "no question that privity exists" through sufficient commonality of interest (App. B-5 - B-6). These standards without dispute applied to Convalescent and Aruba its successor in interest." (so described by the District Court (App. B-5 - B-6).

Nevertheless, the District Court declined to make a finding of privity because allegedly Aruba "did not have sufficient control of the corporate assets" (App. B-6). This was based solely on the assumption that "key assets" of Convalescent were under seizure by the Los Angeles Superior Court at the time the corporation was dissolved. Of course, even if true this did not make Convalescent and Aruba any less privies, but in fact under California law Convalescent was at all times subject to suit, and could sue in its own name under California law after dissolution. Furthermore, as the District Court's own recital of the facts show, Convalescent was merely in litigation with a corporation to enforce certain agreements made between those parties. Aruba was in no less "control" of the assets than was Convalescent. The District Court's ruling with respect to privity was clearly without merit.

The only other ground for the District Court's decision was that "the two actions do not involve the same issue and/or claims for relief" (B-6 - B-7). This palpably ignores the record, it is submitted. The first trial involved proof of the overcharges, alleged proof that Convalescent was the providers' alter ego, dissolution of the corporation, transfer to Aruba, and related testimony. The second complaint sought recovery on the same basis and the proof at the trial before the District Court was the same

as that in the first case, as the District Court's memorandum decision clearly reveals.

It is respectfully submitted that the undisputed record establishes that the judgment here involved is barred by the doctrine of *res judicata*. The initial judgment on the merits precludes the Government from relitigating issues against Convalescent or its privy Aruba that were or could have been raised in the original action.

III

THE AFFIRMANCE BY THE TWO JUDGES OF THE COURT BELOW WITHOUT OPINION, IN THE LIGHT OF THE DISSENTING OPINION INDICATING THAT THIS COURT'S DECISION IN *FEDERATED* WAS BEING CLEARLY DISREGARDED, DEPRIVED PETITIONER ARBITRARILY OF KNOWLEDGE OF THE REASONS FOR THE AFFIRMANCE OR THE ABILITY TO ANSWER AND TO FILE A MEANINGFUL PETITION FOR REHEARING, GRANTED TO PETITIONER BY THE RULES OF THE CIRCUIT COURT. UNDER THE PARTICULAR CIRCUMSTANCES, PETITIONER WAS DEPRIVED OF PROCEDURAL AND SUBSTANTIVE DUE PROCESS.

Since *Mullane v. Central Hanover Bank & Trust Company,* 339 U.S. 306 (1950), until the recent decision of the Court in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985), the criteria for judging due process has been detailed. In the adversary process, the essential elements at the very least are, first, adequate notice of the basis for governmental action; second, a neutral decision-maker; third, an opportunity to present evidence to the decision-maker; fourth, to confront and cross-examine

evidence to be used against the person; fifth, a decision based on the record with a statement of reasons for the decision. Especially, when a governmental interest or benefit has been conferred upon an individual, a person has a claim within the ambit of the due process clause whenever governmental action has accrued to his detriment. At least this much process is always due. "The right not to be singled out for hurtful treatment by the State without a chance to talk back and to be told why, will increasingly have to be identified as a substantive aspect of personal liberty." *Tribe, Lawrence H., American Constitutional Law* (Foundation Press, 1978), p. 560. Arbitrary adjudicative procedure plainly raise significant due process concerns.

There was on this case a tripartite panel of decision makers. Before them for consideration was a judgment rendered by a District Judge without basis of law. One of the members of the panel reasoned, in writing, that the judgment unquestionably flouted a decision of the United States Supreme Court which had propounded a governing doctrine of legal, social and public importance. The Federal Rules of Civil Procedure provide a party with the right of petition for rehearing and rehearing in banc. F.R.A.P. Rule 35 (b), and U.S. Ct. of App. Ninth Circuit, Rule 12, 28 U.S.C.A.

The object of such a petition is to point out specific claims that the Appellate Court has misapplied the law, or the facts, or both. Here the dissenting opinion clearly stated the grounds for reversal. But Appellant was not furnished with the slightest hint of the reasons for the rejection of the position of the dissent by the majority. Accordingly, the opportunity offered petitioner for further review, by the established procedure was deprived of its substance.

The petitioner could only speculate about what possible basis the majority had for its affirmance.

The dissent appeared to petitioner to be unanswerable. It seemed to petitioner that the only possible explanation for the majority ruling was a refusal to abide by the record, or a view that established law should be changed, or some bias on the part of the majority. Yet without any majority opinion, petitioner cannot assert that any of these factors existed. In effect, petitioner has been deprived of the opportunity to meaningfully apply for a rehearing or to petition this court.

Since the stated dissent found no legal basis for the judgment, the petitioner could find no rational ground that would tend to support the silence of the majority. All that was left was speculation, an inappropriate Reed for the exercise of a given government benefit. Moreover, the dissenting opinion noted that this Court's decision in *Federated* precluded an "ad hoc determination of the equities in a particular case." This admonition by Judge Boochever appeared to suggest that the affirmance without opinion had been based on inapplicable consideration in light of the policy principles enunciated in *Federated*. Justice in this case if it was to satisfy the appearance of justice, as well as justice itself, therefore required a statement of reasons for the affirmance, it is respectfully submitted. Whatever may be the situation in the ordinary case where there is affirmance without opinion, where in effect the court rejects the appeal as totally devoid of merit, the case here is unique in light of the dissenting opinion holding that the action was unquestionably barred by *res judicata* under an express decision of the United States Supreme Court, and without a record or decision in the district court to support any other opinion than the bar of *res judicata*.

"The fundamental requisite of due process of law is the opportunity to be heard." *Green v. Lindsey,* 456 U.S. 444, 449 (1982); *Memphis Light, Gas and Water Division v. Craft,* 436 U.S. 1 (1978), (indaquate notification procedure; not reasonably calculated to inform defendants of an opportunity to present their objections); as long as some deprivation of a governmental interest is involved, "a conclusive presumption that led to the termination of the appellees' benefits without any opportunity for them to present need denied them due process of law." *U.S. Dept of Agriculture v. Murry,* 413 U.S. 508, 516-517 (1973); *Perry v. Sinderman,* 408 U.S. 593, 601 (1972) ("A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."); *Goldberg v. Kelly,* 397 U.S. 254, 271 (1970) ("... the decision maker should state the reasons for his determination and indicate the evidence he relied on.")

It is respectfully submitted that the petition for certiorari should be granted to resolve the conflict here between the decision of this Court in *Federated* and the judgment of the Court below and also to settle the due process questions raised under the particular circumstances of the case as discussed above.

In the final point of the argument which follows, petitioner suggests that as an alternative this Court remand the proceedings to the Circuit Court with instructions to state the reason for the affirmance of the judgment. cf. *Schlagenhauf v. Holder,* 379 U.S. 104, 111-112 (1964) ("Normally, wise judicial administration would counsel remand of the cause to the Court of Appeals to reconsider this issue of 'good cause.' However, in this instance the issue concerns the construction and application of the

Federal Rules of Civil Procedure. It is thus appropriate for us to determine on the merits the issues presented and to formulate the necessary guidelines in this area.")

IV

IN THE LIGHT OF THIS COURT'S SUPERVISORY JURISDICTION OVER PROCEEDINGS OF THE FEDERAL COURTS, PETITIONER SUGGESTS AS AN ALTERNATIVE THAT THE COURT REMAND THE CASE TO THE CIRCUIT COURT WITH INSTRUCTIONS TO STATE THE REASONS FOR THE AFFIRMANCE OF THE JUDGMENT.

It is well established that this Court has general supervisory power over lower Federal Courts. The power is granted by statutes and may be exercised either by the promulgation of general rules or by the announcement of a rule of decision in a particular case. 28 U.S.C. Sections 2071-2072. There appear to be no substantial limitations upon this Court's power to correct lower Federal Court procedures deemed unfair or unjust. Such power should be invoked here. The effect is to raise the standards of fairness in the administration of federal justice.

A. This Court only recently has dealt with the exercise of the Court's supervisory jurisdiction in civil cases. *Frazier v. Heebe,* ____ U.S. ____, 107 S.Ct. 2607, 2611 (1987). "This Court may exercise its inherent supervisory power to ensure that these local rules are consistent with 'the principles of right and justice.' " See also, *Spevack v. Strauss,* 355 U.S. 601 (1958), granting the petition, vacating orders denying petitioners leave to amend complaint, and instructing allowance of petitioner's proposed amendments to the complaint and determination, in light of the amended complaint, the issues raised by petitioner's appeal.

In *Mitchell v. United States,* 348 U.S. 905, 906 (1955), the Court stated: "We have not considered the merits of these cases, nor have we determined their relation to our recent opinions, *supra,* believing that re-examination by the Courts of Appeals is desirable even in those cases remotely involving the principles laid down in the net worth decisions." Again in *Thiel v. Southern Pacific Company,* 328 U.S. 217, 225 (1946), holding that the systematic exclusion of wage earners from a federal court jury panel was unlawful, the Court stated:

> "It follows that we cannot sanction the method by which the jury panel was formed in this case. The trial court should have granted petitioners' motion to strike the panel. That conclusion requires us to reverse the judgment below in the exercise of our power of supervision over the administration of justice in the federal courts. See *McNabb v. United States,* 332, 340. On that basis it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class."

The proper observance of procedural rules has also called for the exercise of the Court's supervisory power in criminal cases. *McCarthy v. United States,* 394 U.S. 459, 464 (1969); *Mesarosh v. United States,* 352 U.S. 1, 14 (1956); *Rea v. United States,* 350 U.S. 214, 217 (1956).

B. A significant case that arose from the Ninth Circuit bears importantly on the issue here. In the *Western Pacific Railroad Case,* 345 U.S. 247, 260, 267-268 (1953), petitioners had lost their case before a three judge court in the Court of Appeals. Petitioners applied for rehearing before the Court of Appeal *en banc.* The panel denied rehearing and struck as unauthorized by law or practice the request that the rehearing be *en banc.* At that time, a

statute, 28 U.S.C. Section 46 (a), granted power to a majority of the circuit judges of a circuit to order hearings and rehearings *en banc* and to establish the procedure governing the exercise of that power. Such was the interpretation of the Supreme Court of the language of the statute. The Court concluded that if the statute was to achieve its fundamental purpose, then in the exercise of the "general power to supervise the administration of justice in the Federal Courts," the Court would define the requirements of the law and "insure their observance." The Court concluded that the statute did not compel the adoption of any particular procedure, clearly not *compelling* each member of the entire Court to initially consider a pertition for rehearing, but that litigants could suggest that a rehearing be held *en banc* under the law.

> "Accordingly, we vacate the order of the division denying petitioner a rehearing and vacate the order of the full court denying petitioners leave to file a motion to reinstate their petition for rehearing *en banc*; we remand the case to the Court of Appeals for further proceedings. We hold that the statute is simply a grant of power to order hearings and rehearings *en banc* and to establish the procedure governing the exercise of that power . . . whatever the procedure which is adopted, it *should be clearly explained,* so that members of the Court *and litigants* in the court may become thoroughly familiar with it; and further, whatever the procedure which is adopted, it *should not prevent a litigant* from suggesting . . . that his case is an appropriate one for the exercise of the power. On remand, . . . the court should determine *and clearly set forth* the particular procedure it will follow, henceforth, in exercising its *en banc* power." (emphasis added).

Petitioner respectfully submits that if the Court should deem it expedient to permit the two members of the panel to preliminarily state the reasons for affirmance of the judgment, in the light of the written dissenting opinion and reliance on *Federated,* that the proceedings here be remanded to the Circuit Court with instructions to state the reasons for affirmance before final consideration by this Court. See also, *Taragon v. Eli Lillyar Co., Inc.,* 838 F.2d 1337 (D.C. Cir. 1988)

No greater reason exists for granting a Writ, than one which reestablishes the right of a litigant to know the basis of denial of a right which is granted by the constitution. Litigants are left with, and should not be left with, dismay, wonder, perplexity, and even a sense of abandonment of justice, when no rational basis appears for a decision. A citizen has the right to know and *should* know. Respect for the law demands such.

CONCLUSION

For the reasons aforestated, this Petition for Certiorari should be granted. Petitioner reiterates that if the Court should be of the view that under the particular circumstances of this case remand is appropriate, that the petition for Certiorari be granted and the cause remanded to the Court of Appeals with instructions to state the reasons for affirmance before final consideration by this Court.

Respectfully submitted,

LEO BRANTON, JR.
Attorney for Petitioner

APPENDIX A

DECISION AND DISSENTING OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ASSOCIATED CONVALESCENT ENTERPRISES, INC.,
Defendant-Appellant.

No. 85-5891
85-5944

D.C. No. C-83-0430-JMI

ORDER

On Appeal from the United States District Court
Central District of California
James M. Ideman, Judge, Presiding

Argued and Submitted: December 7, 1987
Pasadena, California
AND ENTERED
Filed: December 21, 1987

Before: SNEED, PREGERSON, and BOOCHEVER, Circuit Judges.

The decision below is affirmed.

BOOCHEVER, Circuit Judge, dissenting.

The controlling rule of law in this case is clear: "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dept. Stores, Inc. v. Moitie,* 452 U.S. 394, 398 (1981).

In a prior proceeding, the government moved to dismiss Aruba Bonaire Curaco Trust Co. (ABC) without prejudice. District Judge Schnacke, however, dismissed ABC *with* prejudice. There seems to be no question that appellant Associated Convalescent Enterprises, Inc. (ACE) was in privity with ABC, its successor corporation. It is equally clear that the issue of "alter ego" liability *could* have been raised in that earlier action.

Under the unique circumstances of this case, I would remand to the district court to allow the government an opportunity to seek relief from Judge Schnacke's dismissal pursuant to Fed. R. Civ. P. 60(b). In the absence of such relief, however, I find no choice but to hold that res judicata applies here to bar the government's present suit against ACE. [The Supreme Court's decision in *Moitie* simply precludes an "ad hoc determination of the equities in a particular case." 452 U.S. at 401.]

I respectfully dissent from the order affirming the district court's judgment in favor of the government.

APPENDIX B

MEMORANDUM DECISION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

ASSOCIATED CONVALESCENT ENTERPRISES, INC.,
Defendant.

CASE NO. CV-83-0430-JMI

MEMORANDUM OF DECISION

FILED March 25, 1985
ENTERED March 26, 1985

This is an action brought by the United States to enforce judgments in three related District Court lawsuits consolidated into one action in 1980. In the consolidated action, the District Court upheld the 1979 final administrative determination by Blue Cross that three health care providers had overcharged Medicare payments. The Ninth Circuit Court of Appeals subsequently upheld the decision by the District Court.

During the pendency of the administrative and Federal Court appeals, the assets of the three defendants had been dispersed or transferred to Panama. The government now seeks to have the defendant, Associated Convalescent Enterprises, Inc. ("ACE"), adjudged the alter ego of the three defendants of the previous action in order to satisfy its judgment.

I.

The relevant facts are as follows: Each of the three health care providers, Euclid Convalescent Center ("Euclid"), California Care Corporation ("CCC"), and El Rio Development Company ("El Rio"), known collectively as the Sunray complexes, operated a convalescent home in California in the late sixties and received funding under the Medicare Act, 42 U.S.C. §§ 1395-1395rr.

In 1972 and 1973, Blue Cross completed audits of the hospitals for cost periods between 1967 and 1969. The audits conducted by Blue Cross revealed that the provider corporations overcharged Medicare in the following amounts: El Rio — $670,596.00; CCC — $154,176.00; Euclid — $328,570.00. The disallowances were primarily made for the following reasons: (1) Substantial double charging for the same services; (2) Failure to provide written documentation for claims; and (3) Failure of the providers to include certain advances made by Medicare on their cost reports.

Ownership of the convalescent homes was split into two parts. One home, either El Rio, CCC, or Euclid, owned the operations of the facility, while ACE owned the real property and equipment which was leased back to the operator company. The operator company was left with no real assets which Medicare could attribute overcharges to, while ACE received the benefits of the overcharges. In June 1976, three years after the audit determinations were finalized, providers filed administrative appeals. These appeals were over two years late but were allowed by both Blue Cross and the Department for Health and Human Services. After a lengthy administrative appeal fraught with delay tactics and other bad faith actions by providers, the administrative hearing officer dismissed the appeal on May 14, 1979. The government then sued in

District Court on May 13, 1980, to enforce the overpayment determination by Blue Cross. The District Court held that the providers had acted in bad faith in the administrative hearing. Further, the Court held that dismissal of the action was proper because the providers had forfeited their right to challenge the overpayments by failing to exhaust their administrative remedies.

In the original suit against the three operator companies, a number of defendants besides these three companies were named. On October 22, 1981, the government requested that many of these other defendants be dismissed without prejudice in order to expedite the proceeding. One of the parties that the government requested be dismissed was Aruba Bonaire Company. By Judgment entered January 22, 1982, Judge Schnacke ordered that Aruba Bonaire and others be dismissed with prejudice.

The government now seeks to reach funds which were recovered by defendant ACE in state court litigation between ACE and Associated Care Enterprises ("Care"). Care was an independent Delaware corporation set up for the purposes of effecting convalescent hospital mergers. ACE, as owner and lessor of Euclid, El Rio, and CCC, entered into an agreement with Care to deliver all of their operations and personal and real property in return for cash and stock. In order to carry out this arrangement, it was necessary for defendant to purchase the leases and operations owned by CCC, El Rio, and Euclid. The operating assets and good will were acquired by defendant from El Rio and CCC without purchase of any ownership interest in them. The transaction became effective at the end of business, October 31, 1969. Care acquired everything the beginning of the next day. In the case of Euclid, defendant bought the Euclid stock so that a stock for stock transfer was possible. Defendant transferred the

Euclid improvements and the Euclid stock to Care at the same time, November 1, 1969, for 155,000 shares of Care stock.

For a variety of reasons, the public offering failed. This led to extensive litigation between defendant and Care concerning the hospitals. ACE's recovery of assets in that litigation is the source of the funds which plaintiff seeks to reach under the alter ego theory.

The issues here are (1) whether the dismissal of Aruba Bonaire Company in the previous action acts to collaterally estop this action, and (2) whether the government can reach assets of ACE in order to satisfy the judgments against Euclid, El Rio, and CCC. The government contends that the corporate entity should be disregarded under a lesser standard than that applied in conventional alter ego cases. Defendant asserts that ACE has maintained a separate and distinct identity from that of the three health care providers, and the imposition of liability under the alter ego theory would be improper.

II.

A. STATUTE OF LIMITATIONS

Where a federal right is being enforced, and the sole remedy is in equity, the Federal Court may apply equitable principles in determining whether the action is barred. *Holmberg v. Armbrecht,* 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed. 421 (1946). That is, the Federal Court is not strictly controlled by statutes of limitations, and the doctrine of laches is applicable to both the plaintiff and the defendant. *Id.*

Courts have used equitable principles in order to preserve the plaintiff's day in court. *See e.g., Partlow v.*

Jewish Orphans' Home of Southern Cal., 645 F.2d 757 (9th Cir. 1981).

An action based on the alter ego theory is an equitable action. *Seymour v. Hull and Moreland Engineering*, 605 F.2d 1105, 1111 (9th Cir. 1979); *United States v. Standard Beauty Supply Stores, Inc.*, 561 F.2d 774, 777 (9th Cir. 1977). In the instant case, plaintiff has been subjected to fraudulent conduct in the form of bad faith appeals by the defendant. Defendant has done everything possible to avoid collection by the government. The equities lie in the plaintiff's favor. The action is not barred by any statute of limitations.

B. COLLATERAL ESTOPPEL

Collateral estoppel will preclude relitigation of issues that have already been litigated in and were necessary to a prior judgment. *In Re Gottheiner*, 703 F.2d 1136, 1139 (9th Cir. 1983). Its use as a means of avoiding needless litigation is left to the broad discretion of the trial court. *Id.*

1. Privity

Collateral estoppel is not generally applicable unless there exists either identity or privity between the parties to the relevant litigation. The person being estopped from relitigating an issue must have been either a party to the prior lawsuit or have been so closely related to the interest of the party to be fairly considered to have had his day in court. *Id.* Privity exists where there is a "substantial identity" of "sufficient commonality of interest" between parties. Further, where a sole shareholder controls the corporation, it is presumed that the shareholder has sufficient commonality of interest in litigation involving the corporation. When a person owns all the outstanding shares of the corporate stock and exercises

control over its day-to-day affairs, there is no question that privity exists through a sufficient commonality of interest. *Id.* at 1140.

A dismissal with prejudice operates as an adjudication on the merits and bars a later action. *Dupree v. Jefferson,* 666 F.2d 606, 609-610 (2d Cir. 1981). Defendant maintains that the dismissal with prejudice as to Aruba Bonaire in the previous action operates to prohibit the instant suit because Aruba Bonaire was the "successor-in-interest" to Associated Convalescent Enterprises by virtue of a Certificate of Winding Up and Dissolution which was filed by ACE well before the filing of the complaint in the earlier action. This certificate declared that Aruba Bonaire was the sole shareholder of ACE and had either paid for or assumed all debts of ACE. In actuality, key assets of ACE were under seizure by the Los Angeles Superior Court at the time the dissolution certificate was filed. Upon that basis, it appears that Aruba Bonaire did not have sufficient control of the corporate assets in order to sustain a finding of privity. We must now look to the second prong of the collateral estoppel test.

2. Issues Litigated

The second prerequisite to the application of collateral estoppel is that the disputed issue must have been actually litigated in the prior proceeding. *General Teamsters, Auto Truck Drivers and Helpers Local 162 v. Mitchell Brothers Truck Lines,* 682 F.2d 763, 768 (9th Cir. 1982).

Even if one were to assume that privity exists by virtue of Aruba Bonaire's status as the sole shareholder of ACE, it would appear in the instant case that the two actions do not involve the same issues and/or claims for relief so as to invoke preclusion. Defendant attempts to equate a dismissal with prejudice on an underlying claim for liabil-

ity on Medicare charges with an action to collect on the judgment rendered under an alter ego theory.

The Supreme Court has held that after trial against a subsidiary, judgment could not be entered against a nonparty parent on the basis of alter ego where that issue had not been litigated. *Zenith Radio Corp. v. Hazeltime Research, Inc.,* 395 U.S. 100, 110, 89 S.Ct. 1562, 1570, 23 L.Ed.2d 129 (1969). Similarly, the issue of whether or not the defendant is the alter ego of the liable operator companies cannot be settled on the basis of a dismissal against another party.

C. THE ALTER EGO THEORY

Plaintiff argues that in order to succeed in this case, the United States must show two things: That the Medicare program was overcharged, and that ACE was interrelated with each of the provider corporations. The government cites a series of "Medicare-piercing" cases in support of its proposition that courts will make presumptions in favor of Medicare and will impose lesser burdens on Medicare than on ordinary plaintiffs in contract or collection actions. *See, e.g., United States v. Normandy Homes,* 428 F. Supp. 421 (D. Mass. 1976); *Woodland Nursing v. Harris,* 514 F. Supp. 111 (S.D. N.Y. 1981); *United States v. Thomas,* 515 F. Supp. 1351 (W.D. Tex. 1981); *United States v. Pisani,* 646 F.2d 83 (3rd Cir. 1981).

It is clear that in our circuit, an alter ego claim in a Medicare case must be analyzed in accordance with state law. *See, e.g., United States v. Healthwin-Midtown Convalescent Hosp.,* 511 F. Supp. 416 (C.D. Cal. 1981). Thus, under California law, "(i)ssues of alter ego do not lend themselves to strict rules and prima facie cases. Whether the corporate veil should be pierced depends upon the

innumerable individual equities of each case." *United States v. Standard Beauty Supply Stores, Inc.*, 561 F.2d 774, 777 (9th Cir. 1977). The corporate veil may be pierced when it is shown:

> (1) that there . . . (is) such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that if the acts are treated as those of the corporation alone, an inequitable result will follow. *Automotriz Del Golfo De California v. Resnick*, 47 Cal. 2d 792, 796, 306 P.2d 1, 3 (1957).

A number of factors may be pertinent to the trial court's determination under the particular circumstances of each case: Commingling of funds and othe assets; the holding out of an individual that he is personally liable for the debts of the corporation; the failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities; identification of the directors and officers of the two entities in the responsible supervision and management (sic); the use of the same office or business location; the employment of the same employees and/or attorney; the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation; the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities; the disregard of legal formalities and the failure to maintain arm's length relationships among related entities; the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another; and the formation

and use of a corporation to transfer to it the existing liability of another person or entity. *Associated Vendors, Inc. v. Oakland Meat Co.,* 210 C.A. 2d 825; 26 Cal.Rptr. 806 (citations omitted).

Several of these factors are present in the instant case, although it is clear that the corporate formalities such as incorporation and some officers' meetings were intentionally and strictly complied with.

Harry Margolis, the attorney who handled the administrative appeals, was the attorney for all four corporations at various times. *Margolis is the central figure behind the operation of the convalescent homes.* At trial, the government introduced exhibits in the form of memoranda between Margolis and the officers of the corporations, showing that *Margolis masterminded the corporate structures.* Margolis *planned and directed all decision-making on behalf of Euclid, El Rio, and CCC in their dealings with ACE.* Margolis *controlled the leasing of the land, buildings, and improvements* by the provider corporations from ACE. Furthermore, the Blue Cross auditor's report concluded that the providers and ACE were operating as a single unit and artificially inflating costs to medicare through a creative accounting system which made use of corporate facades to "move" assets and costs in such a way that it appeared that costs were much higher than they really were.

Margolis set up "paper" officers during the overcharge period, who merely rubber-stamped the decisions of Margolis. Gene Torgan, the administrator of the hospitals and president of CCC from 1967 to 1969, testified that she did not know what connection the convalescent homes had with the health care providers which operated them. She did not know what relationship Michael Chatsky had with the hospitals, although he was president of all three

health care providers after the audit period. Torgan claimed that her duties were to delegate work and to set policies but did not remember who negotiated the lease between ACE and CCC. Although she could recognize her signature, Torgan could not recollect any of the details of the decisions she purportedly made or the contracts she signed.

Elaine Fischel, "owner" of all the stock in Maryelle Corporation, which in turn "owned" all the stock in ACE, was "owner" and "President" of ACE in name only. Fischel admitted that Margolis made the decision to incorporate Maryelle Corporation, that she did not know the nature of the business being done at Maryelle and was unaware of how management decisions were made. As president of ACE she never directed the negotiation of loans, negotiated with CCC, or did any legal work on behalf of El Rio. She testified that Margolis was responsible for and conducted negotiations on behalf of ACE, and that she would sign letters which Margolis drafted for her, making small grammatical changes only. At deposition, she said that she would try to become informed about the transactions which she supposedly was responsible for, because "it was embarrassing to just be typing something."

During the audit period, Michael Chatzky, a young associate working in the law offices of Harry Margolis, was president of ACE and Euclid. On completion of the audits, he was also president of El Rio and Care. Chatzky could not recall who the officers, shareholders, or directors of the corporations were, who the employees were, what the assets of the corporations were, or if the businesses were involved with convalescent hospitals.

As of the dates of the final audit determinations, all of the officers and directors of CCC, Euclid, El Rio, and

ACE were either lawyers or secretaries working in the law offices of Harry Margolis. The common corporate headquarters of El Rio, CCC, ACE, and Euclid was Margolis' law office.

Taken as a whole, these incidents indicate that a unity of interest existed between ACE and the three providers because Margolis alone controlled the corporations. Although not dispositive, substantial ownership of a corporation and dominance of its management are factors favoring the piercing of the corporate veil. *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 Cal.App.2d 825, 837, 26 Cal. Rptr. 806, 814 (1963).

As to the second prong of the test, the equities lie heavily in the government's favor. The government has already sought and received judgment against the three providers. During a bad faith effort at an administrative appeal, providers have sequestered its assets in Panama.

For the reasons set forth above, this Court finds that ACE is the alter ego of Euclid, El Rio, and CCC. The Judgment for the government against Euclid, El Rio, and CCC shall be enforced against ACE for the following sums:

1. $1,153,342.00, plus interest at 7 percent on said sum from January 22, 1982, until the date of this Judgment.

2. Interest at 10.33 percent on the sum described in paragraph one, as provided by 28 U.S.C. 1361, from the date of this Judgment until the Judgment is satisfied.

3. Costs of suit herein.

DATED: March 25, 1985

JAMES M. IDEMAN
United States District Judge

APPENDIX C

ORDER DENYING REHEARING AND REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,
vs.
ASSOCIATED CONVALESCENT ENTERPRISES, INC.,
Appellant.

No. 85-5891
85-5944
D.C. No. C-83-0430-JMI (GX)
ORDER
Filed February 17, 1988

Before: SNEED, PREGERSON, and BOOCHEVER, Circuit Judges.

The panel as constituted above voted to deny the petition for rehearing. Judges Sneed and Pregerson voted to reject the suggestion for rehearing en banc and Judge Boochever so recommends.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX D

JUDGMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
vs.
ASSOCIATED CONVALESCENT ENTERPRISES, INC.,
Defendant.

No. C-83-0430-JMI
JUDGMENT
Filed
May 22, 1985

[1] This action has been tried before this court. The evidence adduced by the parties has been fully considered as well as their legal arguments. This court having made its findings of fact and conclusions of law, it is hereby ORDERED, ADJUDGED AND DECREED:

Defendant, Associated Convalescent Enterprises, Inc. as the alter ego of California Care Corporations, El Rio Development Corporation, and Euclid Convalescent Center, Inc. is indebted to plaintiff United States of America for all sums due and owing to the United States under three judgments rendered by Judge Robert Schnacke of the Northern District of California on January 22, [2] 1982 in *United States of America v. Euclid Convalescent Center, Inc.*, C-80-1858-RHS; *United States of America v. California Care Corporation*, C-80-1861-RHS; *United States of America v. El Rio Development Corporation*, C-80-1862-RHS. Specifically, the United States of America shall take judgment against Associated Convalescent Enterprises, Inc. for the following sums.

1. $1,153,342 plus interest at 7% on said sum from January.

2. Interest at 10.33% on the sum described in paragraph one as provided by 28 U.S.C. 1361 from the date of this judgment until the judgment is satisfied.

3. Costs of suit herein.

JAMES M. IDEMAN
United States District Judge

DATED: May 22, 1985

APPENDIX E

PERMANENT INJUNCTION OF DISTRICT COURT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA
Plaintiff,

vs.

ASSOCIATED CONVALESCENT ENTERPRISES, INC.,
Defendant.

No. C-83-0430-JMI

PERMANENT INJUNCTION

FILED March 25, 1985
ENTERED March 26, 1985

Defendant Associated Convalescent Enterprises, Inc. shall within fifteen days of this injunction take the following acts:

(1) assign in writing to the United States all of its rights, title and interest in the note from Associated Care Enterprises, Inc. to Associated Convalescent Enterprises, Inc. deposited with the Superior Court of Los Angeles, California in L.A.S.C. No. 8357. Said note is in the amount of $1.04 million plus interest from October 31, 1969. Said assignment shall be made and delivered to the United States within fifteen days of this injunction.

(2) transfer, convey and assign all of its right, title and interest in the deed of trust, securing the note described in paragraph one. This deed of trust covers various parcels of property which were used by the Sunray Hospital complex in Los Angeles, California. Said

assignment shall be made and deliverd to the United States within fifteen days of this injunction.

(3) assign and transfer in writing to the United States all rights obtained by Associated Convalescent Enterprises as a result of the judgment in *Marks v. Faith,* Superior Court of Los Angeles, California No. C-40208 to foreclose on the deed of trust described in paragraph 2. Said assignment shall be made and delivered to the United States within fifteen days of this injunction.

(4) assign in writing to the United States all of its rights, title and interest in a trust fund deposited at the Security Pacific National Bank (Main Office, Los Angeles, California) per an agreement of November 28, 1980 between Associated Convalescent Enterprises, Associated Care Enterprises and Security Pacific Bank. Said assignment shall be made and delivered to the United States within fifteen days of this injunction.

(5) assign in writing to the United States all right, title and interest it has in a trust account located at the First Interstate Bank established on August 3, 1984 as a result of an agreement between Associated Care Enterprises and Associated Convalescent Enterprises.

In satisfaction of its judgment, the United States shall:

(a) first apply all payments made from the proceeds of the trust fund described in paragraph 5 above to which it is entitled by virtue of the above assignment and the judgment in *Marks v. Faith, supra,* once said funds are available as a matter of law. There is currently approximately $85,000 in said trust account.

(b) then apply all funds due to Associated Convalescent Enterprises, Inc. under the trust agreement described in paragraph 4 above once they are available as a

matter of law. There is currently approximately $400,000 in said trust account.

(c) After applying the funds collected under subparagraphs (a) and (b) above, the United States shall foreclose on the trust deed described in paragraph 2 above once foreclosure is available. If after foreclosure, the United States has collected sums in excess of the judgment in this case, the excess shall be returned to Associated Convalescent Enterprises.

JAMES W. IDEMAN
United States District Judge

Dated: 25 Mar. 85

APPENDIX F

28 U.S.C. Secs. 2071, 2072

§ 2071. Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

(As amended May 24, 1949, c. 139, § 102, 63 Stat. 104.)

§ 2072. Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

(As amended May 24, 1949, c. 139, § 103, 63 Stat. 104; July 18, 1949, c. 343, § 2, 63 Stat. 446; May 10, 1950, c. 174, § 2, 64 Stat. 158; July 7, 1958, Pub.L. 85-508, § 12(m), 72 Stat. 348; Nov. 6, 1966, Pub.L. 89-773, § 1, 80 Stat. 1323.)

APPENDIX G

CORPORATIONS CODE

§ 1900. Authorization for Voluntary Dissolution.

(a) Any corporation may elect voluntarily to wind up and dissolve by the vote of shareholders holding shares representing 50 percent or more of the voting power.

(b) Any corporation which comes within one of the following descriptions may elect by approval by the board to wind up and dissolve:

(1) A corporation as to which an order for relief has been entered under Chapter 7 of the federal bankruptcy law.

(2) A corporation which has disposed of all of its assets and has not conducted any business for a period of five years immediately preceding the adoption of the resolution electing to dissolve the corporation.

(3) A corporation which has issued no shares. Leg.H. 1975 ch. 682, 1976 ch. 641, effective January 1, 1977, 1980 ch. 501.

§ 1901. Certificate of Election.

(a) Whenever a corporation has elected to wind up and dissolve a certificate evidencing such election shall forthwith be filed.

(b) The certificate shall be an officers' certificate or shall be signed and verified by at least a majority of the directors then in office or by one or more shareholders authorized to do so by shareholders holding shares representing 50 percent or more of the voting power and shall set forth:

(1) That the corporation has elected to wind up and dissolve.

(2) If the election was made by the vote of shareholders, the number of shares voting for the election and that the election was made by shareholders representing at least 50 percent of the voting power.

(3) If the certificate is executed by a shareholder or shareholders, that the subscribing shareholder or shareholders were authorized to execute the certificate by shareholders holding shares representing at least 50 percent of the voting power.

(4) If the election was made by the board pursuant to subdivision (b) of Section 1900, the certificate shall also set forth the circumstances showing the corporation to be within one of the categories described in said subdivision. Leg.H. 1975 ch. 682, 1976 ch. 641, effective January 1, 1977.

§ 1902. Revocation of Election.

(a) A voluntary election to wind up and dissolve may be revoked prior to distribution of any assets by the vote of shareholders holding shares representing a majority of the voting power, or by approval by the board if the election was by the board pursuant to subdivision (b) of Section 1900. Thereupon a certificate evidencing the revocation shall be signed, verified and filed in the manner prescribed by Section 1901.

(b) The certificate shall set forth:

(1) That the corporation has revoked its election to wind up and dissolve.

(2) That no assets have been distributed pursuant to the election.

(3) If the revocation was made by the vote of shareholders, the number of shares voting for the revocation and the total number of outstanding shares the holders of which were entitled to vote on the revocation.

(4) If the election and revocation was by the board, that shall be stated. Leg.H. 1975 ch. 682, 1976 ch. 641, effective January 1, 1977.

§ 1903. Commencement of Proceedings.

(a) Voluntary proceedings for winding up the corporation commence upon the adoption of the resolution of shareholders or directors of the corporation electing to wind up and dissolve, or upon the filing with the corporation of a written consent of shareholders thereto.

(b) When a voluntary proceeding for winding up has commenced, the board shall continue to act as a board and shall have full powers to wind up and settle its affairs, both before and after the filing of the certificate of dissolution.

(c) When a voluntary proceeding for winding up has commenced, the corporation shall cease to carry on business except to the extent necessary for the beneficial winding up thereof and except during such period as the board may deem necessary to preserve the corporation's goodwill or going-concern value pending a sale of its business or assets, or both, in whole or in part. The board shall cause written notice of the commencement of the proceeding for voluntary winding up to be given by mail to all shareholders (except no notice need be given to the shareholders who voted in favor of winding up and dissolving the corporation) and to all known creditors and claimants whose addresses appear on the records of the corporation. Leg.H. 1975 ch. 682, effective January 1, 1977.

§ 1905. Certificate of Dissolution.

(a) When a corporation has been completely wound up without court proceedings therefor, a majority of the directors then in office shall sign and verify a certificate of dissolution stating:

(1) That the corporation has been completely wound up.

(2) That its known debts and liabilities have been actually paid, or adequately provided for, or paid or adequately provided for as far as its assets permitted, or that it has incurred no known debts or liabilities, as the case may be. If there are known debts or liabilities for payment of which adequate provision has been made, the certificate shall state what provision has been made, setting forth the name and address of the corporation, person or governmental agency that has assumed or guaranteed the payment, or the name and address of the depositary with which deposit has been made or such other information as may be necessary to enable the creditor or other person to whom payment is to be made to appear and claim payment of the debt or liability.

(3) That its known assets have been distributed to the persons entitled thereto or that it acquired no known assets, as the case may be.

(4) That the corporation is dissolved.

(b) The certificate of dissolution shall be filed and thereupon the corporate existence shall cease, except for the purpose of further winding up if needed. However, before any corporation taxed under the Bank and Corporation Tax Law (Part 11 (commencing with Section 23001) of Division 2 of the Revenue and Taxation Code) may file a certificate of dissolution it shall file or cause to be filed the certificate of satisfaction of the Franchise Tax

Board that all taxes imposed under the Bank and Corporation Tax Law have been paid or secured. Leg.H. 1975 ch. 682, 1976 ch. 641, effective January 1, 1977, 1978 ch. 370.

§ 2004. Distribution of Assets.

After determining that all the known debts and liabilities of a corporation in the process of winding up have been paid or adequately provided for, the board shall distribute all the remaining corporate assets among the shareholders according to their respective rights and preferences or, if there are no shareholders, to the persons entitled thereto. If the winding up is by court proceeding or subject to court supervision, the distribution shall not be made until after the expiration of any period for the presentation of claims which has been prescribed by order of the court. Leg.H. 1975 ch. 682, 1976 ch. 641, effective January 1, 1977.

§ 2010. Continued Existence of Dissolved Corporation.

(a) A corporation which is dissolved nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it and enabling it to collect and discharge obligations, dispose of and convey its property and collect and divide its assets, but not for the purpose of continuing business except so far as necessary for the winding up thereof.

(b) No action or proceeding to which a corporation is a party abates by the dissolution of the corporation or by reason of proceedings for winding up and dissolution thereof.

(c) Any assets inadvertently or otherwise omitted from the winding up continue in the dissolved corporation for the benefit of the persons entitled thereto upon disso-

lution of the corporation and on realization shall be distributed accordingly. Leg.H. 1975 ch. 682, effective January 1, 1977.

APPENDIX H

FEDERAL RULES OF CIVIL PROCEDURE

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Rule 35. Determination of Causes by the Court in Banc

(a) When Hearing or Rehearing in Banc Will be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when considera-

tion by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) Suggestion of a Party for Hearing or Rehearing in Banc. A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

FRAP 12

DOCKETING THE APPEAL; FILING OF THE RECORD

(a) Docketing the appeal. Upon receipt of the copy of the notice of appeal and of the docket entries, transmitted by the clerk of the district court pursuant to Rule 3(d), the clerk of the court of appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, the appellant's name, identified as appellant, shall be added to the title.

(b) Filing the record, partial record, or certificate. Upon receipt of the record transmitted pursuant to Rule 11(b), or the partial record transmitted pursuant to Rule 11(e), (f), or (g), or the clerk's certificate under Rule 11(c), the clerk of the court of appeals shall file and shall

immediately give notice to all parties of the date on which it was filed.

(c) (Dismissal for failure of appellant to cause timely transmission or to docket appeal.) (Abrogated)

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986.)

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On May 12, 1988, I served the within Petition for Writ of Certiorari in re: "Associated Convalescent Enterprises, Inc. vs. United States of America" in the United States Supreme Court, October Term 1987, No. .....;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

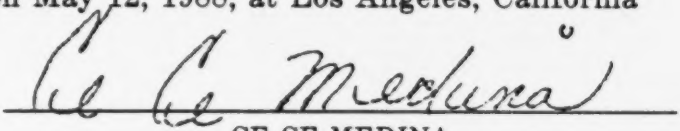
Office of Solicitor General
Charles Fried
U.S. Department of Justice
9th and Pennsylvania Avenue N.W.
Room 5614
Washington, D.C. 20530

Stephen A. Shefler
Assistant United States Attorney
450 Golden Gate Avenue
P.O. Box 36055
San Francisco, California 94102

All Parties required to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on May 12, 1988, at Los Angeles, California



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No. 87-1876

In the Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATED CONVALESCENT ENTERPRISES, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that an action dismissed with prejudice against a corporate entity that was the sole shareholder of petitioner, but continued to judgment against three other entities related to petitioner, bars a separate action on the judgment against petitioner as the alter ego of the three entities.

1. This case arises out of an action brought by the United States to enforce a judgment obtained against three convalescent homes for Medicare overcharges (Pet. App. B1). The overcharges, amounting to more than $1 million, were made between 1967 and 1969 (*id.* at B2). Recovery of those amounts by the United States, however, has not yet taken place because of what the district court described as "delay tactics and other bad faith actions" (*ibid.*) and "fraudulent conduct" (*id.* at B5; see also *id.* at B11). See generally *United States* v. *California Care Corp.*, 709 F.2d

1241 (9th Cir. 1983); *United States* v. *Associated Convalescent Enterprises, Inc.*, 766 F.2d 1342 (9th Cir. 1985).

The action on the judgment was brought against petitioner as the alter ego of the three convalescent homes. In the original action against the three homes, petitioner was not named as a defendant. The government did name as a defendant in that action petitioner's sole shareholder, Aruba Bonaire Curacao Trust Company (Aruba), a Bahamas corporation. Aruba was not sued under the theory that it was the alter ego of petitioner; instead, the government contended that assets of the three convalescent homes otherwise subject to the government's interest had been transferred to petitioner and then distributed by it to Aruba in derogation of the government's rights under the federal priority statute, 31 U.S.C. (1976 ed.) 191, 192. The factual basis for the government's suit against Aruba under the priority statute was a certificate of winding up and dissolution filed with the California Secretary of State. The certificate stated that petitioner had been dissolved; that Aruba was petitioner's sole shareholder and had either paid for or assumed all of petitioner's debts; and that petitioner's assets had been transferred to Aruba (Pet. App. B6).

The government subsequently learned that the statements in the certificate of winding up and dissolution were false, and that petitioner's assets had never been transferred but had been frozen pursuant to a court order in the California state courts (Pet. App. B6). To expedite the litigation, the government sought a voluntary dismissal of Aruba (*id.* at B3). On November 24, 1981, the district court entered an order dismissing Aruba without prejudice. By judgment entered on January 22, 1982, however, the district court dismissed Aruba as a defendant *with* prejudice (*ibid.*). The government did not seek reconsideration of the judgment order.

Following entry of judgment against the three convalescent homes, the government sued petitioner as their alter ego in an effort to enforce the judgment. Petitioner resisted this effort, contending that petitioner and Aruba were in "privity" and that the dismissal with prejudice of Aruba in the underlying action therefore precluded the government's suit on the judgment against petitioner. The district court rejected that contention (Pet. App. B5-B7). The district court also held that petitioner was the alter ego of the three convalescent homes and that therefore the government's previously obtained judgment against the homes should be enforced against petitioner (*id.* at B7-B12).

The court of appeals affirmed without opinion (Pet. App. A1). Judge Boochever dissented, concluding that, because "the issue of 'alter ego' liability *could* have been raised in th[e] earlier action," res judicata principles *required* that it be raised in that action rather than this one. Judge Boochever therefore would have remanded the case in order to give the government an opportunity to seek relief from the order in the earlier action dismissing Aruba with prejudice. *Id.* at A2. A petition for rehearing with suggestion for rehearing en banc was (contrary to the statement in the petition (at 6)) denied without dissent (Pet. App. C1).

2. The court of appeals' rejection of petitioner's res judicata and collateral estoppel arguments is correct and does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

a. The dismissal of Aruba with prejudice in the underlying action against the three convalescent homes does not bar the action against petitioner to enforce that judgment. "Under res judicata, a final judgment on the merits bars further claims by parties or their privies on the

same cause of action." *United States* v. *Mendoza*, 464 U.S. 154, 158 n.3 (1984). Res judicata did not bar the second action here because it did not involve the "same cause of action."

The action to enforce the judgment against petitioner on an alter ego theory is not the same "cause of action" or "claim" as the claim against Aruba under the federal priority statute. See generally *Nevada* v. *United States*, 463 U.S. 110, 130 & n.12 (1983) (discussing definition of "same cause of action"). The final judgment in favor of the United States in the underlying action against the convalescent homes gave rise to a new and separate claim by the United States on the judgment, with new rights of enforcement. Restatement (Second) of Judgments § 17(1) & comment a (1982); *id.* § 18(1). Further, the injuries alleged in the two actions were distinct: in the action against Aruba, the government claimed that assets of the three convalescent homes had been transferred to Aruba in derogation of the government's rights as creditor of the homes; in the second action, the government claimed that petitioner had sufficient control of the three homes that the government should be permitted to enforce its judgment against petitioner as well. Res judicata therefore did not bar this action.*

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* The theory adopted by Judge Boochever in dissent proves too much. If it were true, as Judge Boochever suggested, that a plaintiff suing one party must raise (or by not raising, forfeit) every theory that it *could* raise in order to recover from a nonparty in privity with the named party, then the United States would have been required to raise the alter ego theory in the first action simply because petitioner was in privity with the convalescent homes. Under this theory, it would be irrelevant whether or not petitioner was in privity with Aruba; the action against petitioner would be barred even if Aruba had never been a party. It has never been the law, however, that a plaintiff, in an action to establish liability, must also anticipate the issues that will have to be

b. Nor does the dismissal with prejudice of the action against Aruba bar the action on the judgment against petitioner under principles of collateral estoppel. "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980). The "general limitation the Court has repeatedly recognized" in this context, however, is that "the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case" (*id.* at 95). A claim that is voluntarily dismissed at the request of a party, even one that is dismissed "with prejudice," does not meet the "actual litigation" requirement that is the prerequisite to estoppel. *Lawlor* v. *National Screen Serv. Corp.*, 349 U.S. 322, 327 (1955); *United States* v. *International Bldg. Co.*, 345 U.S. 502, 505-506 (1953). Thus even assuming that petitioner and Aruba were in "privity" for purposes of collateral estoppel, the dismissal of the action against Aruba in the circumstances of this case would not preclude relitigation of any related issue against petitioner.

3. Petitioner's reliance on *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981), is misplaced. There, plaintiff's case had been dismissed on the merits, on the ground that it had no cause of action. Plaintiff thereupon filed the same claim against the same defendants in an action in

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litigated in order for the plaintiff to enforce the judgment that will be entered once liability has been established. See, *e.g.*, *United States* v. *Southern Fabricating Co.*, 764 F.2d 780 (11th Cir. 1985) (action by United States to recover against corporate parent on judgment rendered against subsidiary in action in which parent was not a party); cf. Restatement (Second) of Judgments § 49 (1982).

state court, which was removed to federal court and dismissed a second time, on the basis of res judicata. While plaintiff's appeal of the second dismissal was pending, this Court held, in an unrelated case, that the cause of action originally stated by the plaintiff was a valid one. On review of the res judicata dismissal, the court of appeals created a "public policy" exception to the rules of res judicata to permit the plaintiff's case to go forward (*id.* at 398). This Court held that "such an unprecedented departure from accepted principles of res judicata is unwarranted" (*id.* at 399).

In this case, in contrast, no "public policy" exception to the normal rules of res judicata is at issue. Instead, the normal rules of res judicata do not bar this action because it does not involve the same claim as the first action against Aruba. The first action was brought to establish liability for Medicare overcharges. This action was brought to recover on a judgment. *Federated Dep't Stores* is thus inapplicable to this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JULY 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202 037/60541

No. 87-1876

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

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Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

1. In its reply the government studiously avoids the real issue in this case.

The government's claim that it is proceeding under a different "theory" and under a different "cause of action" may explain why the government is reluctant to discuss the opinion of the Court in *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394 (1981). The government is content to observe that the facts were different. What the government ignores is the admonition by the Court that "there is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*' ". 452 U.S. at 401. The Court will not countenance exceptions allegedly based on "simple justice", "ad hoc determination of the equities in a partic-

ular case". "Public policy" *Id.*, p. 401. Citing an earlier decision, the Court suggested that "the predicament in which respondent finds himself, is of his own making". *Id.*, 401. Other attempts to undermine *Federated* have been rejected by the Courts. See, Petition. p. 9.

2. Although the government virtually concedes on page 4 of its memorandum that the issue of alter ego could have been raised in the first case, it nevertheless insists that it was under no obligation to do so. Unlike the convoluted argument in its footnote (p. 4) — (the only discussion of Judge Boochever's dissent) — this was not a case of "anticipating" an issue; this was an issue that could have been raised and was allegedly available. The situation in *United States v. Southern Fabricating Co.*, 764 F.2d 780 (11th Cir. 1985), cited in its footnote, involved entirely different facts and factors, not involved here. The reference to Restatement (Second) of Judgments, Section 49 (1982) is also inapplicable. Here Convalescent figured in the first action. The government claimed in its complaint that Convalescent assumed the liability of the providers under a contract and agreement in the first action. Plainly the issue of alter ego was available. The government again ignores *Federated*. "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been* raised in that action". 452 U.S. at 398 (emphasis supplied)

3. The arguments of "different theory" and "different cause of action" are plainly without merit. The evidence in the first trial in all its salient features was no different from the evidence in the second trial (Petition, p. 5). All that is now in reality being argued by the government is that a different theory was presented in the second action.

The courts have been uniform in holding that the doctrine of *res judicata* bars all grounds for recovery which could have been asserted in the original action. A party should not be able to re-litigate a matter that that party has already had the opportunity to litigate.

Moreover, if the claim asserted in the second forum arises from the same factual grouping that gave birth to the claim in the first forum, the subsequent claim is barred despite its assertion of different legal theories or request for different relief. When a single case of operative facts forms the basis of both lawsuits, different theories or different claims of relief will not avoid the bar of *res judicata*.

On the issue of "same cause of action", the government points to *Nevada v. United States*, 463 U.S. 110, 130 and No. 12 (1983). The decision in *Nevada* is directly opposed to the government's position and footnote 12 is even more so. The "transactions" approach of the Restatement, detailed in the footnote, is precisely why the cause of action below was barred by the doctrine of *res judicata*. The footnote quotes comment (b) of Section 24 of the Restatement. Comment (c) went even further: "That a number of different legal theories casting liability on an action may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief". References to other sections of the Restatement do not aid the government, under the circumstances of this case.

4. The government switches to a discussion of "collateral estoppel" (p. 5). The government does not dispute that a judgment dismissing a previous suit "with

prejudice" bars a later suit on the same cause of action. The decision cited by the government, *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 327 (1955), specifically so states. The government argues however, that *Lawlor* and *U.S. v. International Bldg. Co.*, 345 U.S. 502, 505, 506 (1953) stand for the proposition that in a case involving collateral estoppel, "full and fair opportunity" to litigate and "actual obligation" are required. First, the primary issue here is *res judicata*. Second, it appears somewhat inexplicable to argue "fair opportunity" when it was the government which chose to ask for voluntary dismissal, and never appealed the dismissal as the merits or ever moved to modify or alter or vacate the judgment, dispute every suggestion to do so. Perhaps the government thought it better to pursue a "different theory", then return to the trial judge in the first case with baseless arguments of "fraud" and "bad faith." The *Lawlor* and *International Bldg. Co.* cases, in any event, do not aid the government. Successive violations after a judgment has been entered, or a pro forma acceptance of an agreement by a Tax Court, may defeat claims of collateral estoppel; such cases are irrelevant here.

5. The short of the matter is the following: (a) The government has not refuted the claim that the judgment herein is barred under the doctrine of *res judicata* in the light of the principles enunciated by the Court; (b) the government has not met the argument of Judge Boochever, the dissenting Judge below; (c) the government has made no serious attempt to support the decision of the district court; (d) the government has left unanswered the petitioner's due process argument (Pet. pp. 12-16); (e) the government has left unanswered the petitioner's argument that the case be remanded in light of the Court's supervisory jurisdiction (Pet. pp. 16-19). The case herein is therefore of vital importance. Inroads into

basic principles enunciated by the Court should not be permitted. Important constitutional issues involving due process and the power of the Court to require fair procedures in the lower courts are issues which have important significance for the entire community.

CONCLUSION

The petition for writ of certiorari should be granted, it is respectfully submitted. In the alternative the petition for certiorari should be granted and the cause remanded to the Court of Appeals with instructions to state the reasons for affirmance before final considerations by the Court.

July 29, 1988

Respectfully submitted,

LEO BRANTON, JR.
Attorney for Petitioner

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 29, 1988, I served the within Petitioners' Reply Memorandum in re: "Associated Convalescent Enterprises, Inc. vs. United States of America" in the United States Supreme Court, October Term, 1988, No. 87-1876;

On the parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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Solicitor General
Department of Justice
Washington, D.C. 20530

Stephen A. Shefler
Assistant United States Attorney
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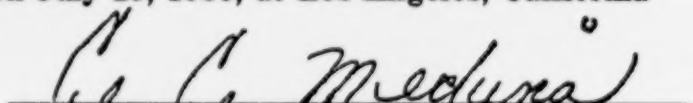
P.O. Box 36055
San Francisco, California 94102

All Parties required to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on July 29, 1988, at Los Angeles, California



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